## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No.

ANTONIO STORNELLI

*vs.*

UNITED STATES GYPSUM COMPANY

*Petitioner.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The decision of the United States Circuit Court of Appeals, Second Circuit, in this action has not yet been reported. A copy of the decision is annexed to this brief.

This is a petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals, Second Circuit, affirming a judgment of the United States District Court, Western District of New York, in favor of the plaintiff in the sum of $5,154.52.

The questions presented in this brief are:

(1) Does Sec. 417 of the New York Labor Law apply to this case since it omits any reference to dust.

(2) Is the cause of action herein an action "to recover upon a liability created by statute" or is it a common law action to recover damages for "a personal injury, resulting from negligence" which is barred by the New York statute of limitations.

(3) Was there substantial evidence that the plaintiff was exposed to free silica dust.

## Statutes Involved

(See p. 2 of Petition)

## Statement of Case

The plaintiff was employed in the gypsum mine of the defendant near the Village of Oakfield, New York from about 1914 (p. 133) to about April 1930. (P. 52.) The action was commenced in April 1935, which, by the Court's application of the New York six year statute of limitations (Sec. 48, Subd. 2, New York Civil Practice Act, set forth at p. 2 of the petition herein) limits the employment for which the defendant could be held responsible to the one year period from April 1929 (six years prior to the commencement of the action) to April 1930 (the last day of employment, p. 494). The plaintiff testified that during this time he was employed as a loader and sometimes as a driller using an electric auger drill; that during his employment there was much dust created by the various drilling operations (p. 135) which was not dispersed or carried away because the defendant shut off its ventilating fan each day for a time and failed to maintain proper circulation in other respects. (Pp. 152; 150.) Briefly, the testimony of the defendant was that the mine was ventilated by a huge fan of constant speed (pp. 390-391) which pushed approximately 100,000 cubic feet of air per minute into the mine. (P. 391.) This air was driven through the working places in the mine, went through the entire mine and out the entrance shaft, there being no other way for the air to get out. (Pp. 391-392.) The fan was located in a housing on the surface. (Photograph, defendant's Exhibit I, p. 535.) The defendant conceded that there was some dust created by the various drilling operations and introduced photographs showing the various drills, stationary and in operation. Exhibit C (p. 527) shows the electric drill in operation. (P. 393.)

Exhibit B (p. 525) shows the same drill not being operated. Exhibits T and U (pp. 543, 545) show the same electric drill again in operation at different heights in the face of the gypsum. (Pp. 453, 455.) During a period in 1931 for the purpose of reducing the overhead, the defendant experimented with a type of air drill. (Pp. 394, 395.) It did not work out and was abandoned in a few months. (See reasons—not dust, pp. 399; 400.) Exhibit D (p. 529) shows such a drill operating. (P. 395.) The exhaust from the drill can be seen coming out in the form of vapor from a hole on the front end of the machine. (Pp. 395, 397.)

The only other type of drill was a "jackhammer" operated by compressed air and used solely for an operation known as brushing roof rock. (Pp. 397, 398.) This drill is shown in operation in Exhibit L. (P. 541.) It is undisputed that plaintiff never used either of the air drills. (P. 399.) The brushing operation was done only to make more head room along the motor roads. It was never used for the drilling of gypsum in the rooms themselves, so that the amount of roof rock drilled was relatively minor. (P. 402.) The roof rock which was brushed was limestone containing not more than 3.6% free silica. (P. 188.) The defendant conceded that the two air drills made dust (pp. 397, 399) but also testified that it rapidly settled to the floor because it was wet, heavy and coarse. (P. 397.) The mine was wet (Pp. 400, 401.) Four pump rooms were maintained with a capacity of 28 million gallons a day. (P. 401.) In the wet season about 16 to 20 million gallons per day. (P. 401.)

After the gypsum was removed from the working faces it was loaded onto small cars, shown on Exhibits K and E (pp. 539, 531) and taken down the main haulageway and hoisted to the surface. A typical abandoned room is shown in Exhibit A (p. 523) and in Exhibit 14. (Pp. 519; 89; 92.)

In 1928—two years before plaintiff left the employment of the defendant, he opened a grocery store in Oakfield. His wife ran it while he continued to work at the mine. (P. 53.) From April 1930, when he left defendant's employ, he continued to operate the store until the present time. (P. 164.) About nine months prior to the trial he also took a job in the nearby mine of the Phoenix Gypsum Company where he was still working at the time of the trial averaging over $40.00 per week. (P. 161; Exhibit J, p. 537.) This was $5.00 more per week than he had made at the United States Gypsum Company. He claimed he did light work in the Phoenix mine. (P. 155.)

Plaintiff had been employed by the defendant for sixteen years (pp. 133; 52) but his exposure in issue was limited to one year at the end of his employment—from April 1929 to April 1930. (P. 314.) He claimed a pre-existing condition of silicosis had been aggravated by his employment during that one year. His only medical witness (Dr. Carnivale) saw him for the first time almost 12 years after the employment ceased. (P. 250.)

This expert medical witness for the plaintiff, in answer to a hypothetical question, stated that plaintiff's employment for the one year was a competent producing cause of the conditions she found (p. 273) and that plaintiff had pneumoconiosis due to the inhalation of dust. (P. 278.) She later stated upon persistent questioning by the trial judge that she couldn't be sure of the type, but finally made a diagnosis of silicosis (p. 311) and "moderate industrial fibrosis." (P. 314.) Concededly, silicosis can come only from the inhalation of free silica dust. (P. 278.)

The term "moderate industrial fibrosis" was coined by her and she knew of no other medical person who used it. (Pp. 302, 303.)

Between the date the employment ceased in 1930 and the time of the trial in 1942, the plaintiff's only medical attention was by "a man and woman" whose names he could not recall (p. 171) whom he saw three times, including his visit to Dr. Carnivale whom he first saw January 19, 1942. (P. 250.)

A chemist called by the plaintiff to prove that he was exposed to free silica testified he had gone into the mine to find samples with free silica in them (p. 192); that some samples from one point were obtained which contained from .3% to 3.6% of free silica. This, however, was only approximate. (P. 203.) He could not recall whether he took the samples from a main haulageway or from a room, or it might have been a cross cut or maybe even at the entranceway going into a room, or it might have been a motor road. (P. 203.) He admitted that samples taken at one point would not necessarily show the same chemical analysis as samples taken as little as 200 feet away, and that the free silica content might vary 2 or 3% (p. 203); that in the air of any busy city he would expect to find free silica to the extent of 12%. (P. 201.)

No proof was offered concerning the amount of free silica dust in the air which could be breathed by the plaintiff, nor that the plaintiff was working at or anywhere near the place from which the chemist took his samples. Nor was there any testimony that even the small amount of free silica found in the samples (the largest one was in roof rock) would have been suspended in the air so that it could be breathed. Nor was there any proof whatsoever that the dust which the plaintiff's witness described was not composed entirely of gypsum particles. The uncontradicted testimony of the defendant is that pure gypsum dust is harmless. (Pp. 337; 340; 315.)

## POINT I

**Section 417 of the Labor Law does not apply since it makes no reference to the removal of dust.**

The pleading in this case—as submitted to the jury—was based wholly upon a liability created by Sec. 417 of the Labor Law. That section provides as follows:

> Ventilation. An air current sufficient to remove smoke and noxious gases and to insure the safety of every employee shall be conducted along every passageway and working place.

Sec. 417 makes no mention of dust. The first portion of the statute refers only to "An air current sufficient to remove *smoke and noxious gases.*" There is no claim in this case that plaintiff's condition was due to *smoke* or *noxious gases.* If he had any condition, it was caused by dust and could not have been caused by anything else.

Unless we are to assume that "smoke and noxious gases" includes dust, the sole duty of defendant was to maintain an air current sufficient "to insure the safety of every employee" along every passageway and working place. But such an admonition does not create a "statutory" cause of action. It is general in character. It has specifically been held by the New York Court of Appeals to merely "supplement the common law rules * * *." (*Mautsewich vs. United States Gypsum Co.*, 217 N. Y. 593, 598.) Thus no cause of action, other than in common law negligence could have been based upon it.

The Court below has read the word "dust" into the statute and has stated its reasons as follows:

> Air, filled with the dust of powdered rock, is within this language; to deny to it the name of 'noxious gas' would disregard the plain purpose of the Act; and indeed, even if we were disposed to be literal, air is a gas, and air filled with finely comminuted particles of rock

> is a noxious gas, just as air filled with finely comminuted particles of partly burned wood is smoke. (Opinion, p. 867.)

But air is not commonly understood to be a gas, and the addition of dust does not make it one. *Webster's New International Dictionary*, 2d. Ed. 1934, among the definitions of gas states:

> 2. In popular usage, any gas, or gaseous mixture, with the exception of atmospheric air; specif.: *a* Any gas used to produce anesthesia, as laughing gas (nitrous oxide) or ethylene. *b* Any combustible gaseous mixture used for illuminating or as a fuel; as, natural *gas*, coal *gas*, etc.

The definition of dust in the same authority is:

> 1. Fine dry pulverized particles of earth or other matter; that which is crumbled to minute portions; fine powder; as, clouds of *dust;* bone *dust*.

The inherent properties of gases and dusts are so different that the legislature could not have intended to include dust in the statute. Commonly encountered gases are lighter than air and tend to rise. Dust is heavier than air and falls to the ground unless stirred up by an air current. This is particularly true of free silica (quartz). (Spec. grav. 2.66, *Drinker & Hatch "Industrial Dust"*, (McGraw-Hill Book Co., 1936, pp. 43; 60.) The legislature never intended that the air current required was to remove or disperse dust. It was aimed directly at the matters mentioned—smoke and gases.

Sec. 417 has its origin in the *Labor Law of 1890*. (Chap. 394, Sec. 4.)

Sec. 4 provides:

> The inspector shall examine into the manner of the ventilation of all mines, and shall see that the ventilating current shall be conducted and circulated to and

> along the face of each and every working place throughout the entire mine in sufficient quantities to insure the removal of powder, smoke and other noxious gases, to such an extent that all working places and traveling roads shall be in a safe and fit state to work and travel therein.

In 1897 (Chap. 415, *Laws of 1897*, Sec. 122) the word "powder" was dropped and the materials to be removed by the air current limited to "smoke and noxious gases." This phraseology was continued through the amendments of 1907 (Chap. 399, Sec. 122) and 1909. (Chap. 36, Sec. 122.) In 1921 the present Sec. 417 was enacted as part of the new *Labor Law of New York*. (Chap. 31, *Consolidated Laws*, L. 1921, chap. 50.)

It seems obvious that the word "powder" was dropped from the statute in 1897 as being unnecessary since it could refer only to powder smoke from blasting which was covered by the phrase "smoke and other noxious gases" anyway. But nowhere throughout the long history of Sec. 417 does the word "dust" appear. This is not strange for two reasons—first, possible dangers from certain types of dust were not recognized generally until about ten years ago and therefore could not have been in the minds of the legislature. Second, the true purpose of an air current is not to remove dust from the mine anyway, since no practical volume of air would do so.

Moreover, a statute must be strictly construed. Obviously, an air current sufficient to remove *smoke and noxious gases* might not be sufficient to remove *dust*. And in construing a statute which so changes the common law rule as to "create" a new cause of action and which also increases the common law liability, the Court should not give it broader scope than its plain meaning imports.

> If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will

be strictly construed. A statute, even when it is remedial, must be followed with strictness, where it gives a remedy against a party who would not otherwise be liable. The courts will not extend or enlarge the liability by construction; they will not go beyond the clearly expressed provisions of the act.

*Miller vs. Town of Irondequoit*, 243 N. Y. App. Div. 240, 242, affd. 268 N. Y. 578.

*Sutherland Statutory Construction, Sec.* 371.

*Leppard vs. O'Brien*, 225 N. Y. App. Div. 162, 164, affd. 252 N. Y. 563.

A similar rule of statuory construction is that

> Rules of the common law are to be no further abrogated than the clear import of the language used in the statute absolutely requires.

*Transit Comm. vs. Long Island R. R. Co.*, 253 N. Y. 345, 355.

*Bertles vs. Nunan*, 92 N. Y. 152, 158.

In *Piecconka vs. Pullman Co.*, 89 Fed. 2d. 353, 356, the Court was considering Sec. 299 of the Labor Law which provides for the elimination and removal of harmful substances including *dust* from the air in *factories*. There, it was claimed that the statute should be construed so as to include a cabinet. The Court said:

> * * * the meaning should be plain, and though we ought to construe it favorably, we are not warranted in adding features not specified. A hood and fan is not a hood and fan *and* a cabinet; * * *.

Likewise, an air current sufficient to remove smoke and noxious gases is not an air current sufficient to remove smoke and noxious gases and *dust*.

## POINT II

**Section 417 of the Labor Law does not create a statutory cause of action separate and distinct from a common law action for negligence. If any cause of action is alleged, it is barred by the statute of limitations.**

The statute of limitations applicable to a negligence cause of action is three years from the last employment. (*Michalek vs. United States Gypsum Co.*, 76 Fed. 2d. 115; modified 298 U. S. 639; *Schmidt vs. Merchants Despatch Transportation Co.*, 270 N. Y. 287; *New York Civil Practice Act*, Sec. 49, subd. 6.)

The plaintiff was last employed in April 1930 and the action was commenced in April 1935.

The statute of limitations applicable to a statutory cause of action is six years from the last employment. (*Michalek vs. U. S. Gypsum Co.*, 76 Fed. 2d. 115; modified 298 U. S. 639; *Schmidt vs. M. D. T. Co.*, 270 N. Y. 287; *New York Civil Practice Act.* Sec. 48, Subd. 2.)

If the action here is one to recover damages at common law for "a personal injury, resulting from negligence" it is barred. (*New York Civil Practice Act.* Sec. 49, Subd. 6.) If it is one "to recover upon a liability created by statute" it is not barred. (*New York Civil Practice Act*, Sec. 48, Subd. 2.) The statutes are set forth herein at p. 2 of petition.

It is the contention of the petitioner that Sec. 417—the sole basis of liability—is merely declaratory of the common law and does not create any liability which did not exist at common law in New York at the time the statute was enacted. Long prior to that time the employer was under a duty to furnish a reasonably safe place to work and was liable in negligence for an injury to his employee caused by breach of this

duty. (*Kirby vs. Montgomery Brothers & Co.*, 197 N. Y. 27, 31.) This included the duty to furnish reasonably safe appliances. (*Burke vs. Witherbee*, 98 N. Y. 562, 565.) The plaintiff now contends that a new or statutory cause of action has been created which was unknown to the common law.

No Appellate Court, either Federal or State, has passed upon this question as applied to Sec. 417, other than in the case at bar. The *Michalek* and *Schmidt* cases (supra) dealt with motions based upon complaints which alleged Sec. 299 of the Labor Law as a basis of liability. Sec. 299 after stating the *general* duty of an employer to provide *factory* work rooms with

> * * * proper and sufficient means of ventilation, natural or mechanical or both, as may be necessary, * * * and proper and sufficient ventilation and proper degrees of temperature and humidity * * * (Subd. 1.)

sets forth *specific* and *detailed duties* concerning what shall be done about machinery creating dust or impurities. Subd. 2 of the statute states as follows:

> All machinery creating dust or impurities shall be equipped with proper hoods and pipes connected to an exhaust fan of sufficient capacity and power to remove such dust or impurities; such fan shall be kept running constantly while such machinery is in use * * *.

Subd. 3 is even more specific and detailed. It provides:

> If dust, gases, fumes, vapors, fibers or other impurities are generated or released in the course of the business carried on in any work room of a factory in quantities tending to injure the health of the employees, suction devices shall be provided which shall remove such impurities from the work room, at their point of origin where practicable, by means of proper hoods connected to conduits and exhaust fans. Such fans shall be kept running constantly while the impurities are being generated or released.

These last subdivisions—2 and 3—the New York Court of Appeals held created a statutory cause of action "which would not exist but for the statute." (*Schmidt vs. M. D. T. Co.*, supra, p. 305.)

In the *Michalek* case (supra) the Circuit Court of Appeals split, the majority holding that Sec. 299 did not create a statutory cause of action. The dissenting opinion, which held that a statutory cause was created, points out that the pleading was based upon Subdivision 2, (p. 118, *Michalek* case) and it was apparently assumed in both cases that Subdivision 1 added nothing to the general common law duty of the employer to provide a safe place to work. The *Michalek* case was later modified by this Court to conform with the holding of the New York Court of Appeals in the *Schmidt* case. (298 U. S. 639.) Sec. 299 applies only to a factory and does not apply to a mine. Therefore, it does not bear upon this case except as a measure of comparison.

Sec. 417, unlike Subdivisions 2 and 3 of Sec. 299, merely restates the common law duty of a mine operator to provide ventilation in a mine. It is, therefore, similar to Subdivision 1 of Sec. 299 which restates the common law duty to provide ventilation in a factory.

Nor did the legislature intend something greater than the common law duty to provide a safe place to work when the word "insure" was used in Sec. 417. This word could not have been used in the sense that an employer was the insurer of every employee from all the hazards accompanying mine ventilation regardless of the facts—as would seem to be indicated by the opinion below. (Opinion, p. 868.) In *Mautsewich vs. United States Gypsum Company*, 217 N. Y. 593 (the cause of action arose prior to the passage of Sec. 417 in its present

form, but was practically identical so far as the use of the word "insure" was concerned) the Court stated: (P. 598.)

> The legislature, by directing the commissioner of labor to see that every necessary precaution is taken to insure the safety and health of employees employed in the mines and quarries and in the construction of tunnels of the state and to prescribe rules and regulations therefor, intended to supplement the common-law rules relating thereto and thereby further to insure the safety of those employed in such dangerous employments.

Other statutes quite similar to Sec. 417 have been held by New York courts not to create a statutory cause of action, but to be merely declaratory of, or to supplement the common law. For instance, Sec. 200 of the Labor Law provides that all working places

> * * * shall be constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein.

In the late New York App. Div. case of *Dittiger vs. Isal Realty Co.*, 264 A. D. 279, the Court, speaking of Sec. 200, stated: (P. 281.)

> It is evident, therefore, that the rule of the statute is merely declaratory of the common law to the extent that it imposes on the employer the use of reasonable care. * * * This section is general in character and does not impose the duty of providing any specific safeguard. In this respect it differs from statutes such as section 299 of the Labor Law, violation of which may constitute a cause of action, irrespective of negligence. (See *Schmidt vs. Merchants Despatch Trans. Co.*, 270 N. Y. 287, 304.)

In *Bellows vs. Merchants Despatch Transportation Co.*, 257 N. Y. App. Div. 15—a silicosis action—the Court stated: (P. 16.)

> Section 200 of the Labor Law provides in effect that the employer must provide his employees with a safe place to work and with adequate tools and appliances. It cannot be claimed that this provision is indefinite because that was the common law duty of an employer. *Mautsewich v. United States Gypsum Co.*, 217 N. Y. 593, 597 * * *.

In a late case involving the "window cleaning statute" (Sec. 202, New York Labor Law) a complaint was held to be defective where the cause of action was based solely upon the violation by the defendant of its duty to carry out "the provisions of the Labor Law of the State of New York, the Industrial Code and the Rules of the Industrial Board of the State of New York, to provide anchors attached to the side frames of the windows." Sec. 202 in part states the person in charge of a building must provide "approved safety devices on all windows of such building." But the Court dismissed the complaint, pointing out that the specific allegation of violation of duty was limited to the failure to provide anchors, and that since this is not specifically required by the statute, but only by one of the rules of the Industrial Board "the complaint cannot be so construed as to permit the cause of action to depend upon the statute alone." (*Teller vs. Prospect Heights Hospital*, 280 N. Y. 456, 459.) It was also pointed out that there was no allegation of negligence in the complaint, but "Had the cause of action been based on negligence, violation of a statute might constitute negligence as a matter of law. (*Amberg vs. Kinley*, 214 N. Y. 531, 535; *Martin vs. Herzog*, 228 N. Y. 164; *Schmidt vs. M. D. T. Co.*, supra.)"

In the later case of *Homin vs. Cleveland & Whitehill Co.*, 281 N. Y. 484, the Court again stated that a complaint simi-

lar to the one in the *Teller* case was defective (although dismissed on a different ground) pointing out that "Violation of a statute, without other evidence, constitutes evidence of negligence * * *."

Unlike Subdivisions 2 and 3 of Sec. 299, Sec. 417 does not provide for the installation of any specific devices and, in fact, as shown in the preceding point, does not even mention "dust."

A controlling test in determining whether a statute "creates" a liability is whether the liability is one "which would not exist but for the statute." In *Shepard vs. Taylor Publishing Co.*, 234 N. Y. 465, 468, it is stated:

> A statute 'creates' no liability unless it discloses an intention express or implied that from disregard of a statutory command a liability for resultant damages shall arise 'which would not exist but for the statute.'

An employer, long before the advent of Sec. 417 was under a common law duty to provide a safe place to work which included ventilation in a mine. The general rule is laid down at 20 *Amer. & Eng. Ency. of Law*, 2d Ed., 1902, *Master & Servant*, p. 58 as follows:

> A master who is engaged in the business of mining is bound to use reasonable care to make the place of work reasonable safe. He must, therefore, use reasonable care to ventilate the mine in order to prevent the accumulation of poisons and explosive gases.

And in 39 *Corpus Juris*, *Master & Servant*, Sec. 488, p. 371:

> It is the common law duty of the operator to use ordinary care to furnish sufficient ventilation in the mine for the safety of his employees.

## POINT III

**There is no substantial evidence that the plaintiff was exposed to free silica dust.**

The plaintiff claimed he was injured by the inhalation of *free silica* dust in the mine of the defendant. To lay a basis for such a claim he had to prove that such dust was present where he would breathe it. The plaintiff testified that at certain times there was much dust in the air at or near the places where the plaintiff worked. (P. 135.) The plaintiff's chemist—retained to find such samples of rock in the mine as would be highest in free silica content (p. 192)—testified that he obtained samples and after pounding them with a hammer into some smaller form found upon analysis that they contained from .3% to 3.6% free silica, which was only approximate (p. 203); that he could not recall whether he took the samples from the main haulageway or from a room, or from a cross cut or maybe even at the entranceway going into a room, or it might even have been a motor road (p. 203); that samples taken at one point in the mine would not necessarily be the same as samples taken as little as 200 feet away, and that the free silica contents of such samples might vary as much as 2 or 3%. (P. 203.) There was utterly no testimony that the plaintiff worked at, or anywhere near the indefinite place from which the samples were taken nor that he worked between that place and the fan so that dust might be borne to him along the air current. Nor was there any testimony as to the type of dust contained in that described by the plaintiff.

It was conceded by the plaintiff's physician that silicosis can come only from the inhalation of free silica. (P. 278.) The dust described by plaintiff may have been composed entirely of gypsum dust which is considered harmless by the great weight of medical authority. (P. 315.)

The time in issue here is the last year of the plaintiff's employment—April 1929 to April 1930. (P. 314.) He claimed an aggravation during that period of a pre-existing condition. To recover for that aggravation he had to show that he was in a place where he would breathe this dust during that period. This he utterly failed to do.

To say that there was a small amount of free silica in the rock at one point in the mine and that the plaintiff worked somewhere in the same mine—which may have been a mile away (p. 227)—is not proof that there was free silica dust in the air where the plaintiff could breathe it. Nowhere is there any testimony that the rocks in the mine in general contained any amount—however small—of free silica. We respectfully contend that this gap should not be bridged—as was done by the Court below—by concluding that since there was some "unimpressive" medical testimony that the plaintiff had silicosis and that at some place in the mine silica formed a "small part" of the rock, the "conclusion was almost inevitable" that he acquired his silicosis because of his work in the mine. (Opinion, p. 869.) Certainly, the plaintiff could not establish that he contracted his condition in the defendant's mine simply by showing that he had worked there and that he had the condition, unless he showed conclusively that he had never been exposed at any other place to free silica dust. Not only did he fail to do this, but it was affirmatively shown that after he left the employment of this defendant, he worked for five months in a nearby gypsum mine (p. 158) before his medical witness saw him for the first time on January 19, 1942 (p. 250) and that she based her diagnosis of his condition and the aggravation sustained in the last year of his employment, not only upon his entire employment with the defendant, but

all of his history up to the time she first examined him. Plaintiff's chemist testified that in the air of any busy city he would expect to find free silica to the extent of 12%. (P. 201.)

It has been claimed that the case of *Galeota vs. United States Gypsum Co.*, 123 Fed. 2d. 947, 2d. Circuit, 1941, cert. den. 315 U. S. 813, is authority for a holding that the plaintiff need not show that the plaintiff was definitely exposed to free silica dust. All that the *Galeota* case held was that where it was shown that the plaintiff drilled in concentrations of rock containing free silica he need not further show by an analysis of the air borne dust that there was actually free silica dust in the air. However, although the samples were the same in the *Galeota* case, the proof was quite different. The Court there pointed out that "there was proof that he was drilling in formations which contained substantial amounts of silica. * * *" But in the case at bar there was *no proof* that he was drilling in such formations or was anywhere near formations containing any amount of free silica. But here, the Court in the case at bar, has gone much further. It holds that under New York law all the plaintiff need show is that he worked in a mine where at one indefinite point there was a small amount of free silica; that many years after leaving his employment he was found to have a "condition" caused by silicosis and "repeated respiratory infections" without negativing exposure elsewhere and where the "repeated respiratory infections" were not linked up to his employment.

## Conclusion

It is, therefore, submitted: (1) that the statute upon which liability was predicated (Sec. 417 of New York Labor Law) was improperly applied to this case; (2) that if it was prop-

erly applied, the liability created was one in common law negligence and was barred by the three year statute of limitations (Sec. 49, Subd. 6), and (3) that the plaintiff wholly failed to connect the condition complained of to his employment with the defendant, and that for those reasons no cause of action was made out against this defendant.

The questions here presented are fundamental in this case and are also present in numerous other cases of a like nature pending not only the United States District Court for the Western District of New York, but also in several cases now pending in the New York Supreme Court. A careful consideration of them by this Court is therefore warranted. The proof required to establish a case is also of considerable importance not only in cases pending against this defendant, but also in numerous dust cases pending against other employers in various courts in New York State. Moreover, it is likely that the courts of other States will follow the decision in this case. Thus petitioner respectfully contends that this Court should review the decision of the United States Circuit Court of Appeals in order that it may be reversed.

Dated April 19, 1943.

Respectfully submitted,

T. CARL NIXON,
*Attorney for Petitioner*,
31 Exchange Street,
Rochester, New York.

CASPER V. BALTENSPERGER, Rochester, N. Y.
WENDELL J. BROWN, Chicago, Ill.
*Counsel.*

*Opinion of United States Circuit Court of Appeals for the Second Circuit*

## UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

---

No. 165—October Term, 1942

(Argued February 5, 1943 Decided March 16, 1943.)

---

ANTONIO STORNELLI,

Appellee,

—*v.*—

UNITED STATES GYPSUM COMPANY,

Appellant.

---

Appeal from a judgment of the District Court for the Western District of New York in an action to recover for injuries suffered by the plaintiff through the defendant's violation of §417 of the New York Labor Law.

---

Before:

L. HAND, SWAN and CHASE,

*Circuit Judges.*

---

CASPER V. BALTENSPERGER, for the appellant.

WILLIAM L. CLAY, for the appellee.

L. HAND, *Circuit Judge:*

The defendant appeals from a judgment in an action to recover for injuries suffered by the plaintiff while in its employ. Its liability, if any, must be confined to the violation of §417 of the New York Labor Law because that was all that the judge left to the jury. The plaintiff had worked in the defendant's gypsum mine from some time in 1914 until April 1930, as a "loader" or "driller." His own testimony, confirmed by that of two fellow workmen, was that during this time, the drifts and headings where he worked were constantly filled with clouds of dust caused by the pulverization of rock by drills and other machinery; and that, being forced to breathe such atmospheres, he suffered a disease of the lungs, known as pneumoconiosis, which was the injury for which he sued. The defendant had set up a large fan at the mouth of the mine, designed to blow the dust out of the galleries and headings, but according to the testimony of the plaintiff's witnesses, it did not do so for various reasons not necessary to detail. Although the defendant denied that dust in any serious amount was left in the mine, upon that issue the verdict is conclusive in the plaintiff's favor. The action was brought in April 1935, five years after the plaintiff left the defendant's employment. Sub. 6 of §49 of the New York Practice Act makes three years the period of limitation for "an action to recover damages for * * * a personal injury, resulting from negligence"; and sub. 2 of §48 makes six years the period for "an action to recover upon a liability created by statute, except a penalty or forfeiture." The first question is which of these periods is the right one; the second question, and the only other one of any consequence, is whether the plaintiff proved that he was injured by breathing dust during the only year for which at most he could recover—from April 1929 to April 1930.

Section 417 of the New York Labor Law, which is applicable to mines, provides that "an air current sufficient to remove smoke and noxious gases and to insure the safety of every employee shall be conducted along every passageway and working place." Air, filled with the dust of powdered rock, is within this language; to deny to it the name of "noxious gas" would disregard the plain purpose of the Act; and indeed, even if we were disposed to be literal, air is a gas, and air filled with finely comminuted particles of rock is a noxious gas, just as air filled with finely comminuted particles of partly burned wood is smoke. That being assumed, we may take *Schmidt v. Merchants Despatch Trans. Co.*, 270 N. Y. 287, as an authoritative exposition of the applicable period of limitation. That decision turned upon the meaning of sub. 2 and sub. 3 of §299 of the New York Labor Law; of which the first required "all machinery creating dust or impurities" to "be equipped with proper hoods and pipes connected to an exhaust fan of sufficient * * * power to remove such dust"; and the second required that "suction devices shall be provided which shall remove * * * impurities * * * by means of proper hoods connected to conduits and exhaust fans." The court held that these enactments were for the benefit of those employees who might be exposed to the danger of breathing dust, and that they "created" a "liability" within sub. 2 of §48 of the Civil Practice Act, as distinguished from giving support to a finding that the employer had failed to exercise the care that he should have: *i.e.*, been guilty of "negligence."

We see no difference between "hoods," "pipes" and a "fan" "of sufficient power" (or "hoods," "conduits" and "exhaust fans," which "shall remove"), and "an air current sufficient to remove smoke and noxious gases," except that in the first the means of producing the "air current" is prescribed, and in the second it is left to the employer. In each case the critical consideration is that the statute has prescribed pre-

cautions for the benefit of the employees, which the employer fails to observe at his peril. However careful he may have been, he is liable for any injury resulting from not conforming his behavior to that enjoined; he is made an insurer *pro tanto*. That creates a different liability from failing to provide employees with a safe place to work: the two may overlap; they may in a given instance coalesce; but they are quite different commands. It is true that we think of that common-law duty as though it were imposed before the event, because it demands only "reasonable" care; but that does not specify the conduct required and creates a duty incapable of being known in advance, and it is ascertained and imposed only retroactively. Our excuse is that it is fair to exact conformity to such a standard because it should be the inherited portion of the actor; although never formulated before—being measured by a unique occasion—he will divine it by intuition. Nor is it derived alone from forecasting the probable course of events, though that enters into it. It involves a matching of human interests: it is "legislation" *in parvo*. That is not true of duties such as that before us; the conflict of interest has already been resolved; the employer must provide the "air current," cost what it may; the current's power is measured only by what it will do; if it prove not enough to remove the "noxious gases," the employer must pay.

The distinction is well illustrated by *Teller v. Prospect Heights Hospital*, 280 N. Y. 456, in which the court dismissed the complaint as insufficient in law on its face. It had alleged that the employee had been injured through the employer's failure "to provide anchors" on the frames of windows which he had to clean; but it did not allege that "reasonable care" required these to be installed. Hence it was bad as a declaration at common-law, just because it did not invoke a standard measured by balancing the cost of prevention against the risk to the sufferer. On the other

hand the pleader could point to no unconditional and peremptory command that the employers should install anchors. We need not decide whether a statute, which imposed a duty upon employers measured in the same terms that the common-law measures their duty, would "create" a "liability" under sub. 2 of §48 of the New York Civil Practice Act, or whether the action would remain one "to recover damages * * * for a personal injury resulting from negligence" under sub. 6 of §49. Section 417 of the Labor Law has nothing to do with "negligence" in the sense that that word is used in sub. 6 of §49 of the Practice Act.

There remains only the question whether there was evidence to support a verdict that the plaintiff had suffered any injury from inhaling "dust or noxious gases" between April 1929 and April 1930. The defendant's argument as to this is that the ailment of which he complained could only be produced by silica dust, and there was no evidence that his lungs had been in the least silicified. There was however ample evidence that he had constantly inhaled dust, that this dust was made of powdered rock, and that, certainly at some places in the mine, silica formed a part of the rock, though only a small part. It was possible for the jury to conclude that constant breathing of the powdered rock, no matter how small a percentage of the dust was composed of silica would result in partially silicifying the lungs; and if there was evidence that it had done so, the conclusion was almost inevitable that this had happened while the plaintiff was in the defendant's employ. That his lungs had been to any extent silicified four doctors and one skiagrapher denied; and they were all well qualified. Against them the plaintiff called only a single doctor, a woman who had however specialized in diseases of the chest. Read in print, her testimony is not indeed impressive, but after a long and thorough cross examination, she persisted in standing her ground that, taking the history of the plaintiff's illness, the

X-ray films, the conditions to which he was exposed, and his state of health when she examined him, he was suffering from the dust which he had inhaled, and that he had some silicosis. And, she added, he had more than silicosis. Finally, this condition was aggravated by the dust which he inhaled during the last year of his employment.

But even were there no sufficient basis for the conclusion that the plaintiff had silicosis at all, and were we to throw out the testimony of his doctor altogether, a jury had support in finding that he had a disease of the lungs. How far that disease was caused by breathing dust for sixteen years and how much of the damage was done in the last year, were indeed debatable, but no one could say that reasonable people must deny all connection between them. The jury was clearly entitled to find that during the year in question he had suffered some injury and the amount of the verdict is not reviewable by us at all. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 483-485.

Judgment affirmed.

